UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HOUSING WORKS INC.	:	
	:	
Employer,	:	
	:	
and	:	**Case No. 29-RC-256430**
	:	
RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW	:	
	:	
Petitioner.	:	

PETITIONER'S OPPOSITION TO THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ORDER DENYING THE EMPLOYER'S REQUEST TO WITHDRAW FROM THE STIPULATED ELECTION AGREEMENT AND REQUEST TO STAY THE ELECTION

Larry Cary
Cary Kane LLP
1350 Broadway, Suite 2220
New York, New York 10018
LCary@carykanelaw.com
Fax: (212) 868-6302
Cell: (917) 405 6002

I. Introduction

Housing Works Inc. ("Employer") is asking the Board to review the Regional Director's completely unremarkable Order Denying Employer's Request to Withdraw from the Stipulated Election Agreement and Rescheduling Election dated July 9, 2020, ("Order") annexed to the Employer's Request for Review as Exhibit "A", requiring that the parties go forward on a delayed election pursuant to the terms of their stipulated election agreement ("SEA"), with the pushing back of certain deadlines like the dates of mailing the ballots and when they need to be returned.[1] The Board should reject the request for review as well as the Employer's requested stay of the election because the Employer's Request is devoid of any facts showing that § 102.67(c) of the NLRB's Rules and Regulations governing such a request is implicated. In addition, the Employer's request for a stay of the election pending its granting review is not warranted as there is no automatic stay provided for under the old rules governing this case. "[T]he filing of a request for review of a regional director's decision does not stay an election authorized by the regional director unless the NLRB orders otherwise. 29 C.F.R. § 102.67(b)." *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992).

II. Relevant Facts

The Employer argues that it should be excused from having to go forward with an election it agreed to in the SEA because it has closed a few locations of its business and opened a few other locations. There is no question that pursuant to the Order hundreds of employees covered by the SEA will be voting.

[1] All citations to Exhibits herein are to the exhibits annexed to the Employer's Request for Review. These will be cited herein as "Exhibit '____'".

The Employer argues that the intent of the SEA was to establish a New York City-wide bargaining unit. It argues that this intent is defeated by going forward with an election that does not include the new locations and its employees. The Employer's argument is belied by the express terms of the SEA and the fact that the Employer rejected the notion of a City-wide unit.

A cursory review of the petition filed by the Union shows it sought certification for employees working for Housing Works and over a dozen of its affiliated corporations at various locations *as a single employer* under the law. This would not have been an inappropriate bargaining unit. A copy of the Union's petition is included within Exhibit "D."

An equally cursory review of the SEA shows that the Employer rejected the idea of single employer status with a City-wide bargaining unit, dispensed with identifying the corporate entities involved, and choose to agree to an election involving only specific locations. To make it doubly clear that only employees working at the listed locations were eligible to vote, the SEA explicitly excluded any person employed in any location not listed in the SEA:

> **Further excluding any individual employed at any location not listed in the inclusion section above, which includes, but is not limited to, employees working in Haiti; Puerto Rico; Albany; New York; Washington, DC; or formerly from the SMART program**.

See SEA, Exhibit "B", p. 4 (emphasis in original).

The Employer further argues that the Regional Director did not consider its argument that changed circumstances warranted letting the Employer out of its agreement, an extremely rare occurrence. As a factual matter, the Employer is again wrong. The Regional Director's Order does consider the Employer's arguments and rejects them.

The Regional Director issued a Notice to Show Cause requiring the parties to brief the issues. A copy of the Notice to Show Cause is at Exhibit "C." A copy of the Employer's opening

brief along with its exhibits annexed thereto is at Exhibit "E", and a copy of the Union's reply brief, along with its exhibits annexed thereto, is at Exhibit "F". Not content to abide by the Regional Director's Notice to Show Cause, the Employer, without authority to do so, filed a sur-reply to the Petitioner's reply brief, to which the Petitioner replied. A copy of the Employer's sur-reply is at Exhibit "G", and a copy of the Union's reply to the sur-reply is at Exhibit "H".

The Regional Director's Order explicitly recounts the Employer's position. *See* Order at pp. 2-3, Exhibit "A". And her Order explicitly states: "Having reviewed and considered the parties' positions, I have decided to deny the Employer's request to withdraw from the Agreement…" *Id.* at p. 4. Her Order then goes on to discuss the handling of the election because of the changed circumstances.

III. Standard of Review

To warrant Board review of the Regional Director's Order , the Employer must show it meets the standards set forth in 29 C.F.R. § 102.67(d), which provides:

> The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Emphasis added.

While the Employer claims it is asserting that its request should be granted pursuant to all four prongs of the regulation, it fails to make any showing that its request falls under any of the prongs. It does not argue that the Order departs from Board precedent. (Indeed, as will be shown below it comports with precedent.) As was discussed above, the Employer fails to show that the Regional Director's Order rests on a substantial factual issue that is clearly erroneous which affects the rights of the Employer. (No matter how many times Employer's counsel asserts in the Employer's papers that the SEA encompasses a City-wide bargaining unit, it does not contain such.) As the parties were able to fully brief the issues, and there is no protest by the Employer that this caused prejudice to it, there was no need for a hearing, which obviates the third prong as a basis for granting review. And there are no compelling reasons for reconsideration of the Board's view that absent very unusual circumstances parties may not backout of their approved voluntarily agreement when they stipulate to an election.

IV. Argument

1. The Board Should Reject Housing Works' Request for Review as the Regional Director's Order Fully Comports with Board Law

Housing Works bears a heavy burden to convince the Board that it should reverse long standing Board precedent about voiding an SEA because the relief it seeks is extraordinary and extremely rare, granted by the Board in only one reported case.[2] This is so because the Board has

[2] The only other instance where the Board approved the revocation of an election agreement is *Rehabcare Group of California, LLC*, No. 21-RC-116808, an *unreported* case where the union requested revocation. The Board's decision from May 23, 2014 is two sentences long with two footnotes and unreported, but available at 2014 NLRB Lexis 386. The case does not support Housing Works' argument to revoke the SEA. There, after the election agreement was approved, the employer submitted a voter eligibility list. The list disclosed the potential for about ten challenged employees in a unit totaling about twenty employees (*i.e.*, fifty percent of the unit would vote subject to challenge.) The ten challenges were in a job title that was neither included nor excluded from the bargaining unit description. The Regional Director revoked the election agreement, finding that "unusual circumstances raise serious questions concerning the intent and understanding of the parties" when entering into the election agreement. The Board found

long held that election agreements are contracts, binding on the parties that executed them. *T&L Leasing*, 318 NLRB 324 (1995). As such, election agreements may be set aside only in limited circumstances. Regional Directors may revoke their approval of stipulations for "cause" and parties may withdraw from approved agreements, but only upon an affirmative showing of unusual circumstances. *Id.*, citing *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979). The "unusual circumstances" are those which "*make the agreement impossible to perform.*" *T&L Leasing* at 326, cited with approval *St. Vincent Health System,* 330 NLRB 1051 n.4 (2000) (emphasis added). Impossibility of performance is found only where material agreed-upon terms are impossible to perform. *T&L Leasing* at 326 n.12.

Importantly, the Board granted this relief in *only one reported case* that is totally dissimilar to the case at bar. In *Sunnyvale Medical Clinic*, the NLRB sustained the employer's objection when the Regional Director refused to revoke the election agreement. 241 NLRB 1156 (1979). There, the parties entered into an election agreement approved by the Regional Director. Five days later, a different union filed an election petition covering the identical unit of employees covered by the approved election agreement. The Region treated the new petition as a motion to intervene. A week later, the Region notified the employer and first union that the intervenor would be accorded a place on the ballot. Five days after that, the employer requested permission to withdraw from the election agreement because the intervention of the new union created changed circumstances, and the employer would not have entered into the agreement had it known the intervenor would be on the ballot. The Regional Director denied the request.

The NLRB found that the Regional Director abused his discretion by denying the employer's motion because of the potential of confusion caused by the two unions being placed

---

that the Regional Director did not abuse her discretion. A copy of the Regional Director's decision is attached as Union Ex. 6, which is within Exhibit "F". In the instant case the SEA is clear regarding who will and will not vote.

on the ballot. Unlike the usual case where there is an independent intervening labor organization, the two unions in the case shared a common origin—the leadership of the intervenor split from the first union. When some employees learned of this, they asked to revoke their authorization cards. The NLRB found that the "unforeseen addition of an intervenor whose relationship to the Petitioner had the considerable potential for creating confusion as to the identities of the two labor organizations on the ballot," and thus caused sufficient "changed circumstances" for the employer to withdraw from the election agreement. *Id.* at 1157-58.

Otherwise, the Board has repeatedly rejected employer motions to revoke acceptance of election agreements. *See, e.g.*, *Hampton Inn & Suites*, 331 NLRB 238 (2000), *Highlands Hospital Corp.*, 327 NLRB 1049 (1999), *Unifemme, Inc.*, 226 NLRB 607 (1976), *enf. denied sub nom*. *NLRB v. Unifemme, Inc*., 570 F.2d 230 (8th Cir. 1978).

The U.S. Court of Appeals for the Eighth Circuit, reviewing the *Hampton Inn & Suites* and *Unifemme* decisions, acknowledged that the "unusual circumstances" exception to enforcing an approved election agreement has been left "open ended" by the NLRB. To aid its analysis, the Eighth Circuit analogized a motion to withdraw from an approved election agreement to a lawsuit seeking to rescind an executory contract. *See NLRB v. MEMC Elec. Materials, Inc.*, 363 F.3d 705, 709 (8th Cir. 2004). Hence, the Eighth Circuit looked to "contract law rescission principles" in reviewing a motion to withdraw from an approved election agreement. The doctrines that fall under those principles are fraud in the inducement, duress, lack of capacity, and mutual mistake. *See id.* One party's unilateral mistake, however, does not warrant rescission. *See id.*

Here, Housing Works presents no facts demonstrating that there would be confusion on the ballot as in *Sunnyvale Medical Clinic* or that any contract rescission principles would apply. Where, as here, the SEA is absolutely clear about eligibility to vote being contingent on the

employee working at listed specific locations, pointing to having shut down a few locations and opening a few other does not in and of itself justify rescission of the approved election agreement for it has no basis in NLRB law or policy. Moreover, the epidemic in New York City which caused the change in the employer's operations had already begun before the Regional Director approved the SEA.

The Board should reject Housing Works's argument that it should be allowed to withdraw from the approved election agreement because as applied to the present circumstances its supposed intent to have an election for a City-wide bargain unit is frustrated. In the context of a post-election challenge to whether an employee was included or excluded from the unit, "[t]he Board examines the intent [of the parties] on an objective basis, and denies recognition to any subjective intent at odds with the stipulation. *Tel. Signal Corp.*, 268 NLRB. 633, 633 (1984). No less should be said for the current context, and clearly the Employer's subjective intention to have a city-wide bargaining unit, even if credited, is contradicted by the terms of the SEA.

The Employer's argument that since the SEA's unit is a nonconforming unit the SEA should be set aside is totally without merit. In *Hampton Inn & Suites*, 331 NLRB 238 (2000), the Board stated that "it is the Board's practice to honor concessions made in the interest of expeditious handling of representation cases, *even if the Board may have reached a different result upon litigation*." *Id.* at 239 (emphasis added). In that case, the union filed a petition and reached an election agreement with the employer, and then the union filed a second petition covering a different group of workers with the same employer. The employer sought to withdraw from the first election agreement claiming the groups covered by the two petitions share a community of interest. Thus, the question as to whether the stipulated unit shares a sufficient community of interest with the employees sought in the second petition, or whether the Board would include or

combine them in one unit upon litigation, are issues that were not relevant to determining whether the election agreement should be enforced.

In contrast to the employer in *Hampton Inn & Suites,* the Employer here argues that there is no community of interest among any of the employees covered by the SEA or between those covered by the SEA and those who are not: "Candidly, in the absence of the Employer's voluntary agreement, this number of classifications across this many business[es], at this many locations does not have a suitable community of interest under Board policy …." Employer's Request for Review, p. 13. Contrary to the Employer's position that the Board voids a SEA when it has a unit that would not be ordered by the Board, the Board does enforce such agreements.

In *Highlands Hospital*, 327 NLRB 1049 (1999), no unusual circumstances were found to revoke the election agreement where the employer argued that RNs excluded from the stipulated bargaining unit shared a community of interest with the stipulated unit. The Board observed that it permits parties to stipulate to nonconforming units and stipulations should be permitted unless they are statutorily prohibited or violate other established Board policies. In that case, the excluded RNs were specifically excluded from the unit set forth in the approved election agreement, which was clear and unambiguous as to unit placement. *See also Hampton Inn & Suites, supra.*

The Employer relies upon *Business Records Corp*, 300 NLRB 708 (1990) and *Granite and Marble World Trade*, 297 NLRB 1020 (1990), for the proposition that since the stipulated bargaining unit is not one that the Board would have ordered the SEA should be voided. This reliance is misplaced.

Business Records offers no support for the Employer's position as it is concerned with a post-election determination of whether an employee was included or excluded from the stipulated bargaining unit. Here, by contrast, where the election has not been held, there is no confusion

about who is and is not included in the unit. It could not be any clearer, only employees working at the stipulated locations, and having the stipulated job title, are in the unit as per the SEA. Moreover, *Business Records* is distinguished by *Highlands Hosp. Corp.,* 327 NLRB at 1050. *Granite and Marble World Trade* offers no support for the Employer 's position because it is also concerned with a post-election determination of a challenge over who is in or out of the stipulated bargaining unit. Moreover, it clearly stands for the proposition that the SEA is a contract to be enforced unless there are exceptional circumstances, none of which are in the instant case: "It is long-established policy that '[I]n ruling on challenges in cases where the parties have stipulated to the appropriateness of the unit, the Board will rely on the scope of the stipulation itself, with its various inclusions and exclusions, unless it is contrary to any express statutory provisions or established Board policies.'" *Granite Tech., Inc.*, 297 NLRB at 1020 (citation omitted).

2. The Regional Director had Ample Authority to Enforce the SEA and Run the Election with Needed Changes to Account for the Delay.

The instant SEA provides for a mail ballot election to be conducted among specific job classifications at specific locations. Indeed, the SEA explicitly limits voter eligibility to the locations agreed upon by the parties. It prohibits employees of the Employer from voting if they are working at any other location.

The Regional Director established a new date for posting notices, mailing ballots, the return of the ballots, and their counting.

To the degree that individuals in the specific location provided for in the SEA have quit, were fired for cause, or are lawfully permanently separated, and are not reemployed, they are no longer eligible to have their ballots counted, as set forth in the SEA and the Regional Director's

Order. To the degree that individuals are now employed by Housing Works at locations not included in the SEA, they are not eligible to vote.

The instant election was halted only one day before the ballots were to be mailed by the Region. It was delayed in April because the Board in Washington ordered suspension of all elections, including mail ballot elections, due to the Coronavirus. After the suspension was lifted, subsequent delay was the result of the Region not being able to access it offices.[3] It is now appropriate for the Region to conduct the election to determine the choice of the workers, most of whom are actively working because they are essential employees.

The Regional Director has the authority and discretion to conduct the election in accordance with the SEA but with new dates. The Employer conceded this point in its submission to the Regional Director, at page 20:

> Regional Directors have the authority to vary the terms of a stipulated election agreement for special circumstances. In fact, election arrangements, including the dates and places of election and how elections are conducted fall within the discretion of the Regional Director.

Exhibit "E" (citations omitted). And ample case authority supports this conclusion. *See T&L Leasing,* 318 NLRB 324 (1995), *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954); *Halliburton Services*, 265 NLRB 1154 (1982); *Odebrecht Contractors of Florida, Inc.*, 326 NLRB 33 (1998); *CEVA Logistics U.S. Inc.*, 357 NLRB 628 (2011), all of which the Employer cited in its Memo in support of this principle.

According to the Board's *Case Handling Manual, Part Two, Representation Proceedings,* the Regional Director has full authority to proceed with the election pursuant to the SEA. Section 11302.1(b) states that in the case of a postponed election: "The regional director may unilaterally

[3] The Employer's snide comment notwithstanding.

set the date of a rescheduled or canceled election. *Superior of Missouri, Inc*., 327 NLRB 248 (1998)."

The Employer misreads Section 11312.1 when it states that the Region was required to change the original eligibility date for voting in the election. That section is completely silent about the issue. And, to the contrary, Section 11312.1 provides that in leading up to approving a SEA or Directing an Election, if there are unusual circumstances for departing from the usual eligibility date, the Board agent involved should get the information needed to properly resolve the issue. In the instant matter, by contrast, the SEA with its eligibility date was already agreed to by the Employer and approved by the Regional Director.

3. <u>There is No Basis for a Stay</u>

Here the Employer argues for a stay of the election pending a determination of whether the Board will grant the request for review. Such a request is contradicted by Board policy and procedure.

Board policy favors going forward with the instant election in accordance with the SEA. According to Section 11351 of the *Casehandling Manual*, when an election is postponed it should *expeditiously* go forward in accordance with the principles agreed upon in the SEA:

> When an election is not conducted as originally scheduled, the rescheduled election should be conducted, when appropriate, in an expedited manner, but not less than three days after the original election date. When selecting the date for the rescheduled election, the regional director has the authority to set the date for the election, but the agreement of the parties and minimum delay between the original election date and the direction of the rescheduled election should be taken into consideration. *See Superior of Missouri, Inc*., 327 NLRB 248 (1998).
>
> The hours, location and general conditions of the rescheduled election may be set in accord with the principles applied to the originally scheduled election.

Contrary to the Employer's request, the Board has long taken the position that questions concerning representation must be resolved as quickly as possible. The rule governing this case, which became effective in 2015, makes note of the importance of a swift resolution:

> Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. ''[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co*., 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the [Notice of Proposed Rulemaking]—the Board, the General Counsel and the agency's regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency . . .The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The [NLRA] was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

See Decision and Direction of Election, North American Industrial Services, Inc., Case No. 22-RC-258810 (May 5, 2020), annexed as Ex. 5 to the Union's reply brief, which is at Exhibit "F." As explained by the Regional Director for Region 22 in declining to delay a union election in light of the Coronavirus, the Board has long taken the position that it can best prevent economic instability by settling questions concerning representation as quickly as possible. *Id.* Both the current rule governing representation cases, which became effective in 2015, and the new rules now in effect, explicitly point to the Supreme Court's holding in *National Labor Relations Board v. A. J. Tower Co.,* 329 U.S. 324 (1946). *A.J. Tower* holds that

> Within this general framework, ''the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* 329 U.S. at 331...

Id., see also Representation Case Procedures, 84 Fed. Reg. 69524, 69524 (Dec. 18, 2019). As noted above, the Supreme Court has identified speed in recording employees' votes as one interest the Board's representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board's and Congress's emphasis on the need for quick elections. *Id.*

The Employer's reliance on *Piscataway Assocs.,* 220 NLRB 730 (1975) and *Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995) to support the need for a stay is misplaced. In *Piscataway* the Board stayed the holding of an election because of the Region's inclusion in the bargaining unit of potential supervisors under the Act. The Region clearly has not ordered an election that includes employees barred by the Act.

In *Angelica* the Board granted the request for review and ordered a stay of the election where the Region had not held a hearing on the issue of whether there was a contract bar to the petition and there was a novel question about the applicability of the Board's contract bar rule to the facts of the case. In the instant matter, by contrast, the Employer does not assert that there should have been a hearing and nothing novel is asserted in the Employer's papers. Moreover, the Employer is asking for a stay pending the Board's decision to grant its request for review. This is contrary to what the Board did in *Angelica,* where the Board issued a stay only after granting the request to review.

The Employer's request for a stay of the election pending the Board's granting review is not warranted as there is no automatic stay provided for under the old election rules governing this case. "[T]he filing of a request for review of a regional director's decision does not stay an election authorized by the regional director unless the NLRB orders otherwise. 29 C.F.R. § 102.67(b)." *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992).

Here, Housing Works employs essential workers such as nursing staff and other employees dealing first-hand with COVID-19 vis-à-vis Housing Works's residents and clients in New York City. Conducting a swift mail ballot election here will help to maintain industrial stability and give employees the right to vote for union representation at a time when it is most needed in dealing with the COVID-19 pandemic, including the negotiation of the terms of any future layoffs and recall, and, of course, health and safety measures.

As recounted by the Employer in its opening brief to the Regional Director, before the pandemic, Housing Works's employees already struck once in their effort to gain a union voice. Exhibit "E", p. 2. Today's conditions, where working employees are risking their lives and contracting the virus, point to an immediate need to have the election conducted.

[intentionally left blank]

V. Conclusion

That there was a pandemic causing the Employer to shut a few locations and open a few others is of no probative moment requiring a different analysis than that of the Regional Director. For the reasons discussed, the Board is respectfully urged not to grant the request for review nor the request for a stay of the election pending a determination on the request for review.[4]

CARY KANE LLP

/s/*Larry Cary*

Larry Cary
Cary Kane LLP
1350 Broadway, Suite 2220
New York, New York 10018
LCary@carykanelaw.com
Fax: (212) 868-6302
Cell: (917) 405 6002

Attorneys for Petitioner RWDSU, UFCW

[4] While not a legal argument, the Union's Opposition herein would not be complete without pointing out the insolent and snide tone of the Employer's Request for Review. It claims the Regional Director ignored the content of the SEA. Page 2. It declares that the Regional Director's Order is an "obtuse proclamation." Page 2. The Employer says that the Regional Director's Order has an "absence of any analysis and [fails] to consider the law." Page 4. The Employer calls the Order "flawed" with "no analysis." Page 6. It points out a typographical error in footnote 4 and calls it "oddly." It falsely asserts that the Regional Director "failed to undergo an examination of whether 'unusual or special circumstances' exist permitting Housing Works to withdraw from the SEA." Page 14. It describes the Order's response to Housing Works's arguments as "haphazard." Page 16.

In its most insulting attack on the competency of the Regional Director, the Employer states: "Given the absence of any analysis and the failure to consider the law, one must wonder what required nearly two months of consideration by the Region to issue the Order." Page 4. Contrary to the Employer's snide innuendo, there was a pandemic and the Region's processing of this matter was obviously affected.